Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa'adi bin Wan Mustafa

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-15–04 OF 2013 (N)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, AHMAD MAAROP, APANDI ALI AND ABU SAMAH FCJJ
10 DECEMBER 2014

Labour Law — Employment — Domestic inquiry — Respondent found guilty of allegation of sexual harassment by domestic inquiry — Respondent filed report at Industrial Court — Industrial Court held that respondent had committed misconduct of sexual harassment — Whether respondent deprived of fair hearing when Industrial Court allowed cross-examination of complainant 'in camera' and in absence of respondent — Industrial Relations Act 1967 s 30(5)

The present appeal arose from the Court of Appeal's dismissal of the decision of the High Court. The respondent was a 'paxing' crew in the appellant flight and at the material time was holding the post of leading steward. On the same flight a new assistant stewardess was on duty ('the complainant'). In her complaint to the management of the appellant, the complainant alleged that the respondent had sexually harassed her. It resulted in a domestic inquiry being held by the appellant. There were two charges preferred against the respondent. The domestic inquiry found the respondent guilty of the charges and was thus dismissed with immediate effect. Aggrieved by the dismissal, the respondent filed a report at the Industrial Court which concluded that the claimant had committed the misconduct of sexual harassment and the act was indeed a serious affront to the dignity of any self-respecting woman like the claimant. The Industrial Court opined that the offence only deserves the severe punishment of dismissal. In applying before the High Court for an order to quash the award of the Industrial Court, the respondent relied on several grounds including a complaint that the Industrial Court committed procedural impropriety when it directed the complainant's evidence to be given 'in camera' and in the absence of the respondent. It was also held that adverse inference should be made for the failure by the complainant to call other witnesses although their testimonies were already in the bundles of documents of the domestic inquiry. In granting the order of certiorari, the High Court accepted the contention of the respondent that he was deprived of fair hearing when the Industrial Court allowed the cross-examination of the complainant 'in camera' and in the absence of the respondent. Further, the respondent was said to have been deprived of the right to cross-examine those witnesses who testified during the domestic inquiry but were not called by the complainant

during the Industrial Court hearing. An appeal to the Court of Appeal was dismissed. Hence, the present appeal. It was the contention of the appellant that the main issue to be considered should be whether the 'Respondent was denied of substantive and/or procedural fairness proceedings when the learned Chairman of the Industrial Court decided to conduct the proceedings 'in camera' ie without the presence of the respondent in Court, during the latter part of the cross-examination of the complainant but in the presence of the respondent's counsel who participated in the proceedings pursuant to the procedural ruling and cross-examined the complainant without any impediments'.

Held, allowing the appeal with costs:

(1) Despite the wide discretionary powers given to the Industrial Court under s 30(5) of the Industrial Relations Act 1967 ('Act'), it should not be assumed that it could conduct its proceedings in any manner and according to its own whims and fancies. The Industrial Court was required to observe the rules of natural justice, in particular to observe procedural fairness and to avoid procedural impropriety (see para 22).

(2) Procedural impropriety was said to have occurred when a decision maker (including an administrative tribunal or an arbiter) empowered by public law in the form of legislation or common law (that is, prerogative power), in coming to a decision (including his refusal to make a decision) with consequences affecting 'some person or (body of persons)' (see para 24).

(3) The basic rules of natural justice are generally understood to mean the right to be heard, the rule against bias and the duty to act fairly. However the scope of the 'duty to act fairly' should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made (see paras 25).

(4) The Industrial Court did not breach the requirements of procedural fairness. No doubt the respondent was not present during the cross-examination of the complainant. However, his counsel was present and conducted the cross-examination. There was also no objection when the Industrial Court ruled that that portion of the proceeding should be heard 'in camera'. It is important to bear in mind that the principles of natural justice should not be 'unreasonably and unnaturally extended so as to frustrate the process of law'. It would suffice to a large extent if the essential elements of the principles are followed, namely, that there must be absence of bias or even appearance of bias, that there must be scope for a fair hearing and that irrelevant materials must not be taken into account. Of course fair hearing could very well be claimed in connection with a right, interest or legitimate expectation (see para 28–30).

(5) It is quite unfair to say now that the Industrial Court violated the principles of natural justice on the basis of denial of procedural fairness, just because the cross-examination of the complainant was done in the absence of the respondent personally. As indicated above s 30(5) of the Act should also be taken into account or else it would be otiose (see para 32).

(6) There was no reason to conclude that the award of the Industrial Court was manifestly unreasonable or that the Industrial Court had committed an error of law in the '*Wednesbury unreasonableness*' sense (see para 39).

(7) There was no merit in the complaint of the respondent that the failure by the appellant to call the witnesses who testified during the domestic inquiry had deprived him of the opportunity to cross-examine them. There was nothing to prevent the respondent from calling those witnesses even though the appellant did not call them. Obviously the appellant was satisfied with the evidence it had adduced without having to call those witnesses (see para 40).

[Bahasa Malaysia summary

Rayuan ini timbul daripada penolakan Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Responden adalah krew 'paxing' dalam penerbangan perayu dan pada masa matan memegang jawatan ketua pramugara. Dalam penerbangan yang sama penolong pramugari sedang bertugas ('pengadu'). Dalam aduannya kepada pihak pengurusan perayu, pengadu mengatakan bahawa responden telah mengganggunya secara seksual. Ia menyebabkan siasatan dalaman diadakan oleh perayu. Terdapat dua pertuduhan yang dibuat terhadap responden. Siasatan domestik mendapati responden bersalah terhadap pertuduhan-pertuduhan itu dan oleh itu dibuang kerja dengan serta merta. Terkilan dengan pembuangan kerja itu, responden telah memfailkan laporan kepada Mahkamah Perusahaan yang membuat kesimpulan bahawa penuntut telah melakukan salah laku gangguan seksual dan tindakan itu sememangnya penghinaan serius terhadap mana-mana wanita yang mempunyai harga diri seperti penuntut. Mahkamah Perusahaan berpendapat bahawa kesalahan itu hanya patut menerima hukuman berat iaitu pembuangan kerja. Dalam memohon di hadapan Mahkamah Tinggi untuk perintah membatalkan award Mahkamah Perusahaan, responden bergantung kepada beberapa alasan temasuklah aduan bahawa Mahkamah Perusahaan telah melakukan ketidakwajaran prosedur apabila mengarahkan keterangan pengadu diberikan 'in camera' dan tanpa kehadiran responden. Ia juga telah diputuskan bahawa inferens bertentangan hendaklah dibuat kerana kegagalan oleh pengadu untuk memanggil saksi-saksi lain meskipun keterangan mereka telah pun dimasukkan dalam ikatan dokumen siasatan dalaman. Dalam memberikan perintah certiorari, Mahkamah Tinggi menerima hujah responden bahawa dia dinafikan untuk perbicaraan yang adil apabila Mahkamah Perusahaan membenarkan pemeriksaan balas pengadu 'in camera'

dan tanpa kehadiran responden. Selanjutnya, responden dikatakan telah dinafikan hak untuk memeriksa balas saksi-saksi tersebut yang telah memberi keterangan semasa siasatan dalaman tetapi tidak dipanggil oleh pengadu semasa perbicaraan Mahkamah Perusahaan. Rayuan kepada Mahkamah Rayuan telah ditolak. Justeru, rayuan ini. Adalah hujah perayu bahawa isu utama yang perlu dipertimbangkan adalah sama ada 'Respondent was denied of substantive and/or procedural fairness proceedings when the learned Chairman of the Industrial Court decided to conduct the proceedings 'in camera' ie without the presence of the respondent in Court, during the latter part of the cross-examination of the complainant but in the presence of the respondent's counsel who participated in the proceedings pursuant to the procedural ruling and cross-examined the complainant without any impediments'.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun kuasa budi bicara yang luas diberikan kepada Mahkamah Perusahaan di bawah s 30(5) Akta Perhubungan Perusahaan 1967 ('Akta'), ia tidak patut dianggap bahawa ia boleh melaksanakan prosidingnya dalam apa-apa cara dengan sewenang-wenangnya. Mahkamah Perusahaan dikehendaki mematuhi rukun keadilan asasi, khususnya untuk mematuhi keadilan prosedur dan untuk mengelakkan ketidakwajaran prosedur (lihat perenggan 22).

(2) Ketidakwajaran prosedur dikatakan berlaku apabila pembuat keputusan (termasuk tribunal pentadbiran atau penimbang tara) diberi kuasa oleh undang-undang awam dalam bentuk perundangan atau *common law* (iaitu, kuasa prerogatif), dalam mencapai suatu keputusan (termasuk keengganannya untuk membuat keputusan) dengan akibat yang akan menjejaskan 'seseorang atau (kumpulan orang)' (lihat perenggan 24).

(3) Rukun keadilan asasi yang asas pada amnya difahami sebagai bermaksud hak untuk didengar, rukun terhadap berat sebelah dan kewajipan untuk bertindak dengan adil. Walau bagaimanapun skop 'duty to act fairly' patut diambil kira berdasarkan kes ke kes berhubung fakta dan keadaan yang mengawal hubungan mereka yang terlibat sebelum keputusan itu dibuat (lihat perenggan 24).

(4) Mahkamah Perusahaan tidak melanggar keperluan keadilan prosedur. Tidak dapat dinafikan yang responden tidak hadir semasa pemeriksaan balas pengadu. Walau bagaimanapun, peguamnya hadir dan mengendalikan pemeriksaan balas. Juga tiada bantahan apabila Mahkamah Perusahaan memutuskan bahawa bahagian prosiding itu hendaklah didengar 'in camera'. Adalah penting untuk diingatkan bahawa prinsip keadilan asasi tidak patut 'unreasonably and unnaturally extended so as to frustrate the process of law'. Adalah mencukupi setakat mana jika elemen-elemen penting prinsip-prinsip tersebut diikuti, iaitu

bahawa hendaklah tiada berat sebelah ataupun kelihatan ada berat sebelah, bahawa hendaklah ada skop untuk perbicaraan adil dan bahawa bahan yang tidak relevan tidak diambil kira. Sememangnya perbicaraan adil boleh dituntut jika dikaitkan dengan suatu hak, kepentingan atau jangkaan yang sah (lihat perenggan 28–30).

(5) Adalah agak tidak adil untuk mengatakan sekarang bahawa Mahkamah Perusahaan telah melanggar prinsip-prinsip keadilan asasi berasaskan penafian keadilan prosedur, hanya kerana pemeriksaan balas pengadu telah dilakukan tanpa kehadiran responden secara peribadi. Seperti mana dinyatakan dalam s 30(5) Akta juga patut diambil kira atau jika tidak ia adalah tidak berguna (lihat perenggan 32).

(6) Tiada sebab untuk membuat kesimpulan bahawa award Mahkamah Perusahaan amat tidak munasabah atau bahawa Mahkamah Perusahaan telah melakukan kesilapan undang-undang dari segi ketidakmunasabahan *Wednesbury* (lihat perenggan 39).

(7) Tiada merit dalam aduan responden bahawa kegagalan oleh perayu untuk memanggil saksi yang memberi keterangan semasa siasatan dalaman telah menafikannya peluang untuk diperiksa balas oleh mereka. Tiada apa-apa yang menghalang responden daripada memanggil saksi-saksi tersebut meskipun perayu tidak memanggil mereka. Adalah jelas perayu berpuas hati dengan keterangan yang telah dikemukakannya tanpa memanggil saksi-saksi tersebut (lihat perenggan 40).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489, CA (refd)

Jebsen & Jessen Engineering (M) Sdn Bhd v David a/l Sandanasamy & Anor [2010] 5 MLJ 628, CA (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)

Nadarajah & Anor v Golf Resort (M) Bhd [1992] 1 MLJ 506, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(3), 30(5)

Appeal from: Application for Judicial Review No 13–1 of 2009 (High Court, Seremban)

P Tharaselvi a/p Pararajasingam (Zul Rafique & Partners) for the appellant.
Indran Kumaraguru (Krishna Dallumah, Manian & Indran) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] On 18 November 2013 the Court of Appeal dismissed the appeal by the appellant against the decision of the High Court made on 28 April 2010.

[2] The High Court had allowed the judicial review application by the respondent and caused to be issued an order of certiorari to quash the award made by the Industrial Court on 7 July 2008. The Industrial Court had dismissed the claim by the respondent for unjust dismissal. The High Court had also ordered that the matter be remitted to the Industrial Court for rehearing before another Chairman.

[3] The appellant was dissatisfied with the decision of the Court of Appeal and sought for leave to appeal to this court. On 25 March 2013 leave was granted on this sole question:

> Whether there has been a denial of substantive fairness and/or a denial of procedural fairness when an Industrial Court, which hears a representation of dismissal without just cause or excuse under Section 20(3) of the Industrial Relations Act, 1967 and allows part of the proceedings ie cross-examination of the Complainant to be heard 'in-camera', without the presence of the dismissed employee, but in the presence of his counsel, who had ample opportunity to and did cross-examine the Complainant? ('the leave question').

THE BACKGROUND FACTS

[4] On 8 May 2003 the respondent was a 'paxing' crew in the appellant Flight MH 2625 from Kuching to Kuala Lumpur. Paxing crew is not on official duty but en route to another destination to report for duty. At the material time the respondent was holding the post of leading steward in the employment of the appellant.

[5] On the same flight a new assistant stewardess Chaik Mei Heng was on duty ('the complainant'). It was her first sole trip. She was assigned to assist in the economy cabin. In her complaint to the management of the appellant made on 16 May 2003 the complainant alleged that the respondent had sexually harassed her. It resulted in a domestic inquiry being held by the appellant. There were two charges preferred against the respondent, namely:

> Charge 1
>
> That you, as a Leading Steward of the Company on 08 May 2003, whilst travelling as paxing crew on board aircraft MH 2625 KCH/KUL, did harass one Flight Stewardess Chai (sic) Mei Heng, S/No. 109952–3, to wit:
>
> (1) I really like your lips, I am sure when I kiss you on the lips its going to taste so sweet. Its not your lipstick ... even if you didn't have your make up on I am sure it would look very sweet and nice as well.
>
> (2) Oh so you like it hard huh? ... Don't worry, mine is very hard! I'm sure you'll love it.
>
> (3) Do you know how to suck, ... You know, whatever that you know how to suck so do you want to do it with me? If you want to do it with me, we can keep it as a secret.
>
> You have thereby committed an act of misconduct inconsistent with the fulfillment of your terms and conditions of employment by virtue of Clause 2, Para 2.2 Appendix 'A', of the MAS Act of Misconduct, and the General Circular from Senior Vice President Flight Operations dated 29 May 2001 and in violation of Clause 15, Para 15.10 of the said procedure, and such act of misconduct attracts major punishment;
>
> Charge 2:
>
> That you, as a Leading Steward of the Company on 08 May 2003, whilst travelling as paxing crew on board aircraft MH 2625 KCH/KUL, did physically harass one Flight Stewardess Chai (sic) Mei Heng, S/No. 109952–3, to wit:
>
> When she introduced herself to you and offered her hand for a handshake, you took hold of her palm and caressed it with both of your hand. (sic)
>
> You have thereby committed an act of misconduct inconsistent with the fulfillment of your terms and conditions of employment by virtue of Clause 2, Para 2.2 Appendix 'A', of the MAS Act of Misconduct, and the General Circular from Senior Vice President Flight Operations dated 29 May 2001 and in violation of Clause 15, Para 15.10 of the said procedure, and such act of misconduct attracts major punishment.

[6] The domestic inquiry found the respondent guilty of the charges and was thus dismissed with immediate effect vide a letter from the appellant dated 18 November 2003.

BEFORE THE INDUSTRIAL COURT

[7] Unhappy with his dismissal the respondent lodged his grievance with the Ministry of Human Resources Malaysia. Pursuant to s 20(3) of the Industrial Relations Act 1967 ('the IRA 1967') the Minister referred the matter to the Industrial Court.

[8] The Industrial Court concluded that 'after analysing the evidence in total and evaluating arguments of both parties, the court finds that the claimant had committed the misconduct of sexual harassment and the act was indeed a serious affront to the dignity of any self-respecting woman like the claimant. It only deserves the severe punishment of dismissal'.

BEFORE THE HIGH COURT

[9] In applying before the High Court for an order to quash the award of the Industrial Court, the respondent relied on several grounds including a complaint that the Industrial Court committed procedural impropriety when it directed the complainant's evidence to be given 'in camera' and in the absence of the respondent. It was also held that adverse inference should be made for the failure by the complainant to call other witnesses although their testimonies were already in the bundles of documents of the domestic inquiry.

[10] In granting the order of certiorari the High Court:

(a) accepted the contention of the respondent that in making its award the Industrial Court committed material errors of law in the '*Wednesbury* unreasonable' sense when it failed to consider:

  (i) that the testimony of the complainant and that such evidence adduced were not corroborated;

  (ii) that there was a delay of eight days in lodging the complaint; and

  (iii) that the strong dissenting view of the chairperson of the domestic inquiry was not duly taken into account,

(b) the High Court also held that the respondent was deprived of fair hearing when the Industrial Court allowed the cross-examination of the complainant 'in camera' and in the absence of the respondent. Further, the respondent was deprived of the right to cross-examine those witnesses who testified during the domestic inquiry but were not called by the complainant during the Industrial Court hearing.

BEFORE THE COURT OF APPEAL

[11] In its judgment the Court of Appeal held, inter alia:

A (a) that the 'appeal turned on one fundamental issue, namely, whether there was procedural impropriety in the proceedings before the Industrial Court. If there was, as found by the High Court, then on that ground alone the award of the Industrial Court should be quashed. If we found that there was no procedural impropriety as alleged, then we should go on to consider the other grounds raised in this appeal';

B

(b) that 'the fact that the Rrespondent was excluded only from the latter part of the complainant's cross-examination does not provide an answer to the fact that by his exclusion from even a small part of the complainant's cross-examination, the respondent was deprived of the opportunity to give instructions to his counsel on hearing what the complainant had said if he was present. The fact that the respondent's counsel was present during the hearing 'in camera' does not provide an answer to the fact that when a person is being cross-examined on a point, an answer to one question may necessitate further questions being asked, depending on what counsel's instructions on the point are and what his client hears in court, which would not be possible with the client's exclusion from court';

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D

E (c) that 'one of the most important parts of any trial is the cross-examination of a witness because that is when the testimony and credibility of any witness is tested. This is especially so where, as in this case, the evidence-in-chief of a witness is given in the form of a witness statement which has already been formulated before the hearing date. It is also during the cross-examination of a witness that a judge has a chance to observe the responses and demeanour of a witness. In this case the credibility of the complainant was seriously challenged. It was therefore a serious tiling to exclude the respondent from even a small part of such an important part of the proceedings and thereby deny him of the rights we earlier referred to'; and

F

G

(d) that 'for the reasons given above we cannot say that the respondent was accorded a fair hearing at the Industrial Court. We accordingly find that the learned judicial commissioner of the High Court was correct to exercise his supervisory jurisdiction to quash the award of the Industrial Court and order the dispute to be remitted for rehearing before a different Chairman. We accordingly dismissed the appellant's appeal and affirmed the decision of the High Court.'

H

BEFORE THIS COURT

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[12] It was the contention of the appellant that the main issue to be considered should be whether the 'respondent was denied of substantive and/or procedural fairness proceedings when the learned Chairman of the Industrial Court decided to conduct the proceedings 'in camera' ie without the

presence of the respondent in court, during the latter part of the cross-examination of the complainant but in the presence of the respondent's counsel who participated in the proceedings pursuant to the procedural ruling and cross-examined the complainant without any impediments'. A

[13] It was also submitted for the appellant that the answer to the issue should be in the negative for the following reasons, inter alia: B

(a) that 'the Court of Appeal erroneously concluded that the respondent was not accorded a fair hearing at the Industrial Court essentially on the ground that regardless of the fact that the respondent's counsel remained in court consequent to the procedural ruling, the respondent was deprived of the opportunity to give instructions to his counsel on hearing what the complainant had said, if he was present, based on different scenarios that may require the respondent's presence in court'; C

(b) that 'the procedural ruling was justified on the basis of the needs of the complainant, as a material witness for the appellant, as balanced against the rights of the respondent, who was at all times legally represented by counsel. Suffice to say that on the facts and circumstances of this case, the procedural ruling is supported by good and valid reason(s). Hence, the ultimate decision of the Industrial Court was correct, proper and right'; D E

(c) that it would have been a denial of natural justice had counsel for the respondent applied for a stand down of the proceedings in order to seek instructions from the respondent but refused. In this case there was no such application and as such it could not be said that there was a denial of natural justice; F

(d) that 'given the wide discretionary powers as to procedure under the IRA 1967, the Industrial Court is empowered to order the temporary removal of a dismissed workman, accused of a misconduct of a criminal/sexual nature in particular, sexual harassment, from the court room, if the material witnesses for and on behalf of the employer refuses to give testimony in the presence of the dismissed workman or if circumstances indicate that the witness is uncomfortable and will not speak freely in the presence of the dismissed workman, provided that counsel for the dismissed workman is present during the questioning of the witness to safeguard the dismissed workman's rights'; G H

(e) that the 'record does not show that the respondent or his counsel objected to the procedural ruling. Instead, it shows that the respondent's counsel remained in the court room and had in fact participated in the proceedings consequent to the procedural ruling by cross-examining the complainant, without impediments'; and I

(f) that 'the record shows that the issue as regards the procedural ruling was

not raised, at anytime before the Industrial Court, but only in the High Court by way of judicial review'. As such 'estoppel under such circumstances would arise and should rightfully be invoked to preclude the respondent from changing course and impeaching the validity of the proceedings in the Industrial Court on the ground that he was deprived of the right to be heard consequent to the procedural ruling'.

[14] In response, learned counsel for the respondent argued, inter alia, that the decisions of the High Court and the Court of Appeal were correct and that estoppel had no application. It was also contended that there was indeed procedural impropriety committed by the Industrial Court and thus a breach of natural justice to the detriment of the respondent.

[15] It was further submitted that the Industrial Court erred in relying on the evidence of the complainant without calling the other witnesses and merely relying on their evidence as recorded during the domestic inquiry. Such approach tantamount to procedural impropriety as it had deprived the respondent the opportunity to cross-examine those witnesses and thus in breach of the rules of natural justice.

FINDINGS OF THIS COURT

[16] At the outset it should be noted that the Court of Appeal focused its decision only on one issue and on a limited factual basis, namely, whether there was procedural impropriety in the proceedings before the Industrial Court when it allowed the cross-examination of the complainant to be heard 'in camera' without the presence of the respondent although his counsel was present and did cross-examine the complainant. In other words, whether the proceeding to allow the cross-examination of the complainant 'in camera' by counsel for the respondent but in the absence of the respondent was a procedural impropriety committed by the Industrial Court.

[17] Although the Court of Appeal noted that the High Court also relied on another issue in coming to its decision, namely, that the Industrial Court committed an error in law in the '*Wednesbury* unreasonableness' sense, it did not address that issue. It is also not an issue before us. Be that as it may, we will consider it, if we think necessary, after we have dealt with the leave question.

[18] In order to address the leave question it is appropriate to first consider s 30(5) of the IRA which stipulates thus:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[19] Our courts had judicially considered the foregoing section. In essence it

'imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience' (see *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489).

[20] Technicalities including estoppel, limitation, laches and acquiescence cannot be invoked to defeat claims that are just and proper (see *Nadarajah & Anor v Golf Resort (M) Bhd* [1992] 1 MLJ 506; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789).

[21] Further, 'the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law.' And it should also be 'allowed to conduct its proceedings as a 'court of arbitration' and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience' (see *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129).

[22] However, despite the wide discretionary powers given to the Industrial Court under s 30(5) of the IRA it should not be assumed that it could conduct its proceedings in any manner and according to its own whims and fancies. The Industrial Court is required to observe the rules of natural justice, in particular to observe procedural fairness and to avoid procedural impropriety (see *Jebsen & Jessen Engineering (M) Sdn Bhd v David a/l Sandanasamy & Anor* [2010] 5 MLJ 628).

[23] In this case the High Court and the Court of Appeal agreed with the respondent that the Industrial Court committed procedural impropriety when making its award.

[24] Now, procedural impropriety is said to have occurred when a decision maker (including an administrative tribunal or an arbiter) empowered by public law in the form of legislation or common law (that is, prerogative power), in coming to a decision (including his refusal to make a decision) with consequences affecting 'some person or (body of persons)', fails:

(a) to observe the 'basic rules of natural justice';

(b) 'to act with procedural fairness towards the person who will be affected by the decision'; or

(c) 'to observe procedural rules that are expressly laid down in the Legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice' (see *Council of*

A *Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

[25] The basic rules of natural justice are generally understood to mean the right to be heard, the rule against bias and the duty to act fairly. However the scope of the 'duty to act fairly' should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made.

[26] As regards procedural fairness it encompasses the procedures used by a decision maker and not so much the actual decision itself. Ordinarily, procedural fairness requires a hearing that is appropriate to the facts and circumstances of the matter, the absence of bias, the availability of evidence and an inquiry into the issue before a decision is made.

[27] In *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 at p 154 Raja Azlan Shah FCJ (as His Majesty then was) said this:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped: see *Local Government Board v Arlidge* [1915] AC 120 at p 138. In the last analysis, it depends on the subject matter. The great need is to deal efficiently and fairly, rather than to preserve all the accouterments of the court room; the considerations of basic fairness are paramount.

[28] Applying therefore the above legal principles to the facts and circumstances of this case while bearing in mind the complaint of the respondent as accepted by the courts below, we find that as a whole the Industrial Court did not breach the requirements of procedural fairness.

[29] No doubt the respondent was not present during the cross-examination of the complainant. However, his counsel was present and conducted the cross-examination. There was also no objection when the Industrial Court ruled that that portion of the proceeding should be heard 'in camera'.

[30] It is important to bear in mind that the principles of natural justice should not be 'unreasonably and unnaturally extended so as to frustrate the process of law'. It would suffice to a large extent if the essential elements of the

principles are followed, namely, that there must be absence of bias or even appearance of bias, that there must be scope for a fair hearing and that irrelevant materials must not be taken into account. Of course fair hearing could very well be claimed in connection with a right, interest or legitimate expectation (see Lord Denning — *The Judge and the Law* edited by JL Jowell and JPWB McAuslan).

[31] With respect we find in this case that the High Court and the Court of Appeal had indeed 'unreasonably and unnaturally extended so as to frustrate the process of law' the principles of natural justice. During the cross-examination of the complainant before the Industrial Court learned counsel for the respondent was never deprived of the right to seek for adjournment to obtain any instruction from the respondent. There was no such application for adjournment in this case.

[32] We therefore find that on the facts and circumstances of this case it is quite unfair to say now that the Industrial Court violated the principles of natural justice on the basis of denial of procedural fairness, just because the cross-examination of the complainant was done in the absence of the respondent personally. As indicated above s 30(5) of the IRA should also be taken into account or else it would be otiose.

[33] Accordingly, the appellant is justified in its complaint as adumbrated above. We are therefore inclined to answer the leave question in the negative and allow this appeal.

[34] However, there is one more issue that is not the subject of the leave question. The issue is whether it could be said that the Industrial Court had also committed an error in law in the '*Wednesbury* unreasonableness' sense.

[35] We are well aware that the parties did not argue this issue before us. But on the facts and circumstances of this case it should not bar us from considering it in order to finally determine this case and to save costs and time (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[36] Thus, having considered the complaint of the respondent related to this issue we are of the view that our answer to the leave question has answered this issue as well.

[37] Further, in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 Jemuri Serjan SCJ (as he then was) observed thus:

> Unreasonableness here, in our view, was used in the context of the broad sense of

A that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. 'Reasonableness' here embraces the various heads of ultra vires — such as misdirecting oneself in law, taking into account irrelevant considerations or failing to take into account relevant considerations — which is now known as the *Wednesbury* principles. See p 228 of
B the Wednesbury Corpn *case* [1948] 1 KB 223.

[38] Indeed a decision would also be considered manifestly unreasonable if no body of persons could have reached it. But in order to come to such conclusion there must be overwhelming evidence to support it.
C

[39] Accordingly, in this case on the facts and circumstances as found by the Industrial Court based on the evidence adduced, we find no reason to conclude that the award of the Industrial Court was manifestly unreasonable or that the
D Industrial Court had committed an error of law in the '*Wednesbury* unreasonableness' sense.

[40] We also find no merit in the complaint of the respondent that the failure by the appellant to call the witnesses who testified during the domestic inquiry
E had deprived him of the opportunity to cross-examine them. There was nothing to prevent the respondent from calling those witnesses even though the appellant did not call them. Obviously the appellant was satisfied with the evidence it had adduced without having to call those witnesses.

F **[41]** Further, the respondent could have objected to the production of the notes of proceeding of the domestic inquiry or the evidence adduced. He did not do so. It was therefore quite unfair for the respondent to raise such an issue before the High Court as though he was deprived of his right before the
G Industrial Court.

[42] We would go further to say that the respondent was present at the domestic inquiry. He heard the witnesses and was therefore fully aware of the nature of their evidence. As such he could have applied for them to be called by
H the Industrial Court as witnesses in exercise of its power under s 30(5) of the IRA. He did nothing except to raise such an issue in his judicial review application.

[43] As such even the second ground given by the High Court in allowing
I the application of the respondent has no basis for the foregoing reasons.

[44] Accordingly, we allow this appeal with costs. We set aside the decisions of the High Court and the Court of Appeal. The award of the Industrial Court is hereby restored.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor